

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES WATSON,

Plaintiff,

v.

M.D. LESTER N. WRIGHT, et al.,

Defendants.

**REPORT and
RECOMMENDATION**

08-CV-00960(A)(M)

This case was referred to me by Hon. Richard J. Arcara for supervision of pretrial proceedings, including preparation of a report and recommendation on dispositive motions [36].¹ Before me is plaintiff's motion for an expedited hearing and preliminary injunction [157]. For the following reasons, I recommend that the motion be denied, without prejudice to renewal.

BACKGROUND

Plaintiff, an inmate, commenced this action *pro se* pursuant to 42 U.S.C. §1983, alleging that defendants have been deliberately indifferent to his medical needs while he has been incarcerated by the New York State Department of Correctional Services, that they prohibited him from participating in a clinical drug trial in violation of due process, and that they have retaliated against him. Third Amended Complaint [96]. Defendant Kathleen Sebelius moved to dismiss the Third Amended Complaint [137].

In response to that motion, plaintiff moved for leave to file a Fourth Amended Complaint [153]. The proposed Fourth Amended Complaint seeks to clarify the claim against defendant Sebelius and also adds new claims for injunctive relief against defendants Karen

¹

Bracketed references are to the CM/ECF docket entries.

Bellamy, Theresa Knapp-David, Dr. Vonda Johnson and Lester Wright. Plaintiff's Cross-Motion [153], p. 3. No decision has been rendered on that motion because briefing is not complete.

Plaintiff now brings this third motion for a preliminary injunction, based upon the Fourth Amended Complaint [157]. His prior motions for preliminary injunctions [50, 77] were denied by my Reports and Recommendations [70, 98] which were adopted by Judge Arcara [74, 110].

ANALYSIS

Since plaintiff's motion is based on his proposed Fourth Amended Complaint, which he has not been granted leave to file, the motion is (at best) premature.

CONCLUSION

For these reasons, I recommend that plaintiff's motion for a preliminary injunction [157] be denied, without prejudice to renewal in the event that his motion for leave to file a Fourth Amended Complaint is granted.

Unless otherwise ordered by Judge Arcara, any objections to this Report and Recommendation must be filed with the clerk of this court by December 6, 2010 (applying the time frames set forth in Fed. R. Civ. P. ("Rule") 6(a)(1)(C), 6(d), and 72(b)(2)). Any requests for extension of this deadline must be made to Judge Arcara. A party who "fails to object timely . . . waives any right to further judicial review of [this] decision". Wesolek v. Canadair Ltd., 838 F. 2d 55, 58 (2d Cir. 1988); Thomas v. Arn, 474 U.S. 140, 155 (1985). Moreover, the district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which

could have been, but were not, presented to the magistrate judge in the first instance. Patterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co., 840 F. 2d 985, 990-91 (1st Cir. 1988).

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules of Civil Procedure for the Western District of New York, “written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority.” Failure to comply with the provisions of Rule 72.3(a)(3), may result in the district judge’s refusal to consider the objection.

SO ORDERED

DATED: November 18, 2010

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge